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November 12, 2004

Memorandum of Ex Parte Communication

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
TW-A325-Lobby
Washington, D.C. 20554

Re: *CC Docket No. 01-338, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*

CC Docket No. 04-313, Unbundled Access to Network Elements

Dear Ms. Dortch:

On November 10, 2004, James C. Smith, Tom Hughes, Gary Phillips, Christopher Heimann, and the undersigned met with FCC staff members Jeff Carlisle, Michelle Carey, Russ Hanser, Jeremy Miller, Pamela Arluk, Rob Tanner and Tom Navin regarding final unbundling rules. SBC described the widespread deployment of competitive loop and transport facilities, the extensive use of ILEC special access services by CLECs and SBC's proposed carve-outs for DS-1 loops and transport unbundling. The attached materials were distributed at the meeting.

Pursuant to Section 1.1206(b) of the Commission's rules, this letter is being electronically filed. I ask that this letter be placed in the files for the proceedings identified above.

You may contact me at (202) 326-8889 should you have any questions.

Sincerely,

cc: J. Carlisle *(electronic copy)*
M. Carey *(electronic copy)*
R. Hanser *(electronic copy)*
J. Miller *(electronic copy)*
T. Navin *(electronic copy)*
P. Arluk *(electronic copy)*
R. Tanner *(electronic copy)*

SBC

Unbundled Access to Network Elements

WC Docket 04-313

November 10, 2004

Guiding Principles

- No retreat on broadband
- FCC Cannot Ignore Special Access.
  - The record irrefutably establishes that CLECs are successfully using special access to serve customers of all types and that they use special access far more than UNEs.
- Impairment Analysis Must Include Reasonable Inferences.
  - If CLECs are Competing Without UNEs in One Market, FCC Must Infer That They Can Likewise Do So in Similar Markets.
  - A proper test asks whether competition on a particular route is *possible* without UNEs, not whether competitive facilities already exist.
- The FCC should preempt states from requiring unbundling of de-listed UNEs and announce rules that will prevent abuse of change of law process.

Competitive Overview

- CLECs Provide High Cap Services Through a Combination of Their Own Facilities, Facilities from Third Parties, and ILEC facilities. *When they use ILEC facilities, they use special access far more than they use UNEs.*

- Despite Limited Use of UNEs, competition is fierce in the Medium and Large Business Markets.
  - ILECs are bit players in the enterprise space.
  - CLECs have won more than half of the medium-sized business market in SBC territory.

- CLECs have extensive fiber networks.
  - CLECs have built competitive fiber networks in all but 10 of the top 150 MSAs. They have built an average of *19* competitive fiber networks in each of the top 50 MSAs.
  - CLECs have deployed 323,963 miles of fiber, including 62,042 local route miles.

- CLECs have deployed fiber rings up and down the streets of major urban areas and already have connected an estimated 31,669 buildings with their own fiber loops. AT&T alone serves 7500 buildings with its own fiber (3rd Q. earnings report)

- State proceedings revealed that CLECs deploy loop facilities at *all* capacity levels, including DS-1.

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CLEC Special Access Use Cannot Be Disregarded

- CLECs use special access far more than UNEs
  - Over 75% of the 511,000 DS1 loops that SBC sells to CLECs are sold as special access not UNEs
  - For DS3s, 97% of the DS3 loops SBC provides to CLECs are sold as special access
  - AT&T has previously admitted that as much as *98%* of the approximately 40,000 DS1s it obtains from ILECs to provide last-mile connectivity to customers – customers to whom it provides local service – are purchased as special access, not as UNEs
  - No fewer than eight CLECs (including AT&T, MCI, or Sprint) purchase nearly all of their high-capacity facilities from SBC as special access, not UNEs.
- More than 90% of SBC's special access sales are wholesale.

CLEC Special Access Use Cannot Be Disregarded

- The fact that CLECs use special access in such large quantities is proof in itself that they *can* use that service to compete. Simply put, they would not spend billions of dollars a year buying special access from ILECs if that were not the case.

- Indeed, in retail markets in which carriers use special access, they have been enormously successful.
  - ILECs are bit players in the enterprise space (SBC has 5% market share).
  - For medium-sized business customers (which includes all who use DS-1 but spend less than $50,000 per year on telecom services), SBC's market share is only 43%. Among SBC's competitors in that space are no less than 8 CLECs who buy at least 90% of their high cap facilities as special access.

Blanket Finding of Non-impairment for the Following

- Wireless and long-distance markets.
  - D.C. Circuit has made clear that competition in those markets precludes a finding of impairment.
  - FCC must adjust interconnection trunk ratio in EELS rules.
  - FCC must rule that local usage test applies to all high capacity facilities, not just combinations thereof.
- Loops & transport at DS3 & above, including dark fiber.
- Existing special access loops and transport facilities.
- Line sharing.

SBC Proposed Carve-out for DS-1 Loops & Transport

- No UNEs for DS1 transport between:
  - wire centers with >10K business lines (21% of SBC's wire centers) or
  - wire centers with >10K business lines and wire centers with between 5K - 10K business lines (13.6% of SBC's wire centers)
  - CLEC may not obtain more than 8 DS1 transport links between any two wire centers.
  - Fiber based collocation is a reasonable indicia for evaluating the characteristics of wire centers where competitive transport is feasible. CLECs have fiber based collocation in over 55% of offices with >10K business lines

- No UNEs for DS1 loops in wire centers with >15K business lines (13% of SBC's wire centers) and no more than 8 DS1s for any building.
  - CLECs have on average lit nearly 10 buildings per wire center with over >15K

Packetized Loops

- The Commission should continue with its long-standing hands-off policy for broadband

- Requiring ILECs to unbundle packetized loops for enterprise customers will directly affect deployment of broadband to serve the mass market

  - SBC is risking its scarce capital in a competitive market and unbundling requirements will limit its investment

- The Commission has already found non-impairment in the medium and large business markets. It should not move backwards.

  - We decline at this time to unbundle the packet switching functionality, except in limited circumstances. . . . The record demonstrates that competitors are actively deploying facilities used to provide advanced services to serve certain segments of the market – *namely, medium and large business – and hence they cannot be said to be impaired in their ability to offer service, at least as to these segments without access to the incumbent's facilities.*

UNE Remand Order, para. 306

Preemption

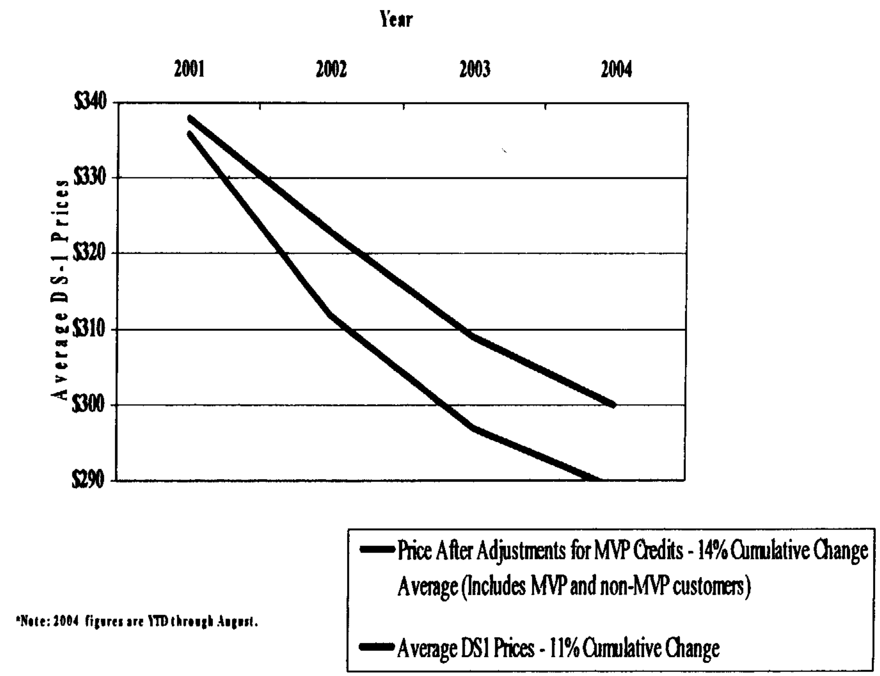
- The Commission should preempt the states from imposing any unbundling obligations beyond those established by the Commission
  - Whether such state action is taken under the auspices of Section 271, State law, or merger conditions
- Adopt conditions to prevent delay in amending interconnection agreements
- Declare that states have no authority to review—and thus approve or reject—commercial agreements

SBC

Special Access Competition and Pricing

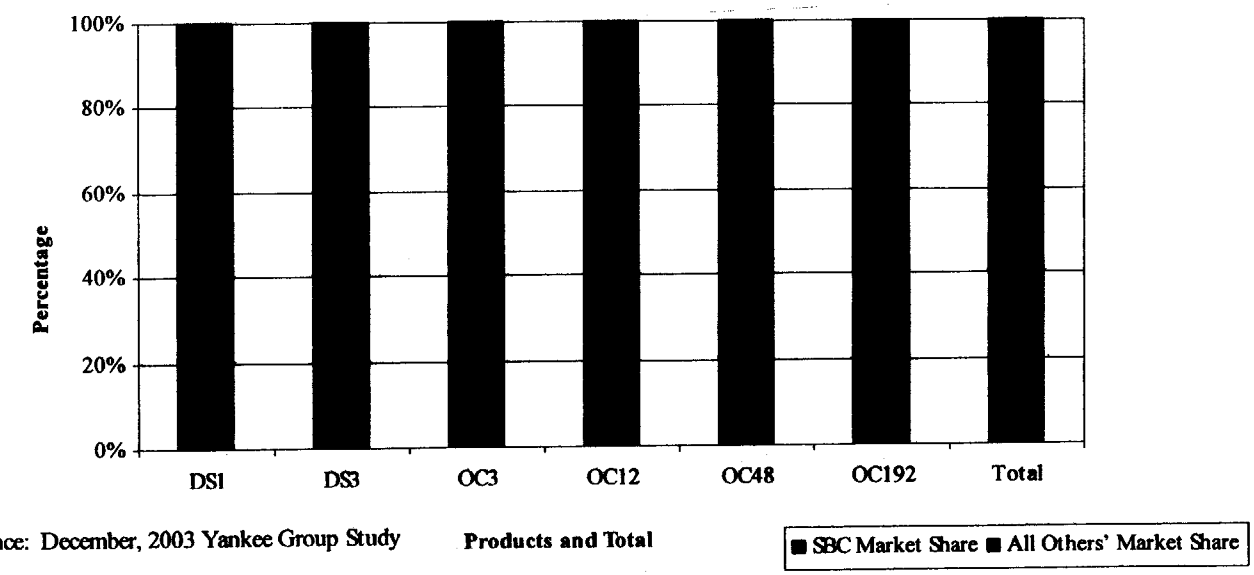
Special Access Rates Have Decreased Significantly in Response to Competition

- SBC special access rates continue to decrease in response to competition
  - DS1 prices have fallen 14% over the past few years.
  - This excludes most price flex contracts, which provide additional discounts
  - Excluding MVP, DS1 prices have dropped 11% since 2001.



SBC High Capacity Market Share

Competitors have won over 40% of the total wholesale market for special access services in SBC's territory. Competitors currently supply over a third of the wholesale market for DS-1 and DS-3 services



*Reference: December, 2003 Yankee Group Study

Competition is Flourishing in the Special Access Marketplace

- All but ten of the top 150 MSAs are now served by at least one competitive fiber network, and the top 50 MSAs have an average of *19* competitive networks.
- CLEC deployments include:
  - AT&T – 21,000 local route miles in 70 MSAs
  - TWT – 12,247 local route miles in 41 MSAs
  - XO – 23,800 total route miles in 34 MSAs
  - MCI – 9,000 local route miles in 63 MSAs
  - Cox – 6,600 total route miles in 23 MSAs

- Carriers are continuing to build networks:
  - "We have about 7,500 buildings on-net now and we continue to build private rings for our largest customers, we built 25 private rings in Q3." – **Hannigan, AT&T President, Oct. 21, 2004 Earnings Conference Call. Source: Thomson StreetEvents transcript. (p. 8)**

Competitors are Flourishing Using Special Access

- SBC has only about 5% of the large business market - a market that is dominated by the large IXCs
- Carriers use special access, not UNEs, to provide service to customers in the large business market
- CLEC claims of anti-competitive pricing are belied by the fact that over 90% of SBC's special access is sold to our wholesale customers, not retail

ARMIS Based Service-Specific Rate of Return Calculations are Meaningless

- Because the FCC froze the separations factors at a time when special access was growing rapidly ARMIS grossly understates actual special access investment
- Indeed, ARMIS data indicates a negative 4.9% return for SBC's interstate switched access
- The Commission recognized that regulatory cost allocations are imprecise, and therefore has required price-cap LECs to report rate-of return information only on total interstate earnings.

SBC Offers Carriers Multiple Discount Options

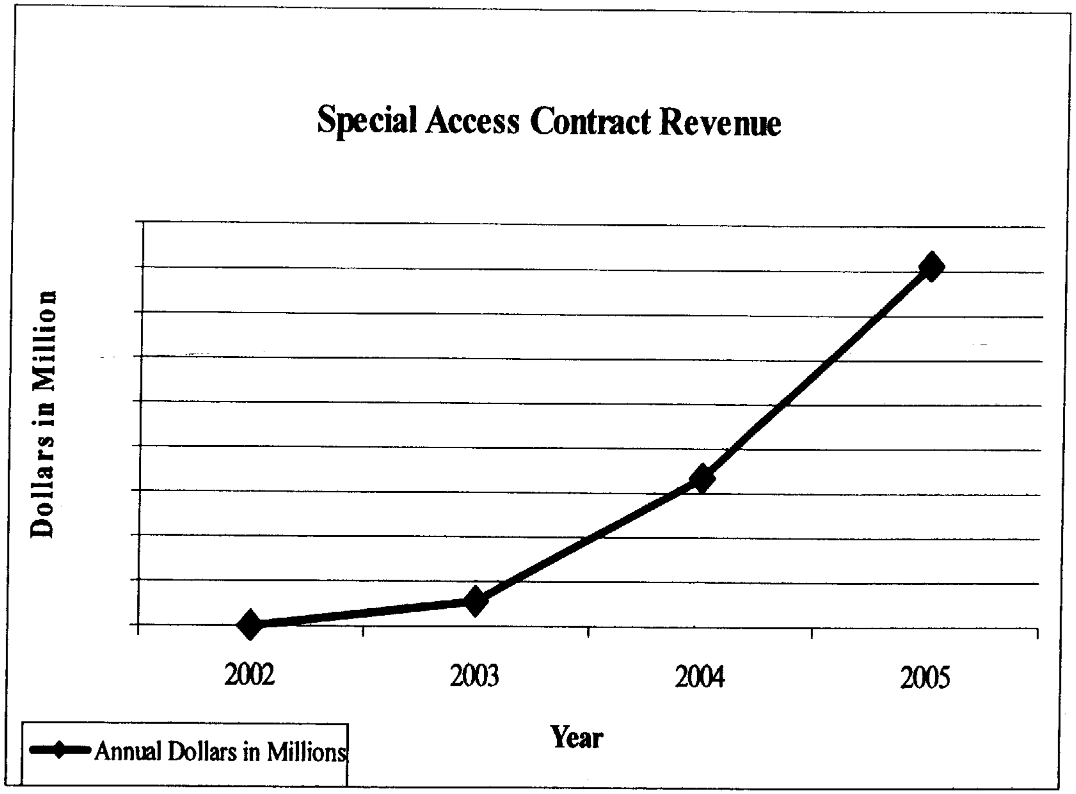
- CLEC claims of high special access rates generally cite month to month rack rates
  - Substantial discounts are available for term commitments of various lengths
  - Term discounts are available without any volume commitment

Price-Flex Contract and Discounts

- SBC's Price flex contracts offer various discounts including an 11% discount for a 1 year term, a 41% discount for a 3 year term and a 45% discount for a 5 year term

- Additional discounts programs are also available on all special access in the form of an optional Managed Value Plan with additional discounts ranging from 9-14%.

- Customers like the competitive offers SBC is able to create with pricing flex. Wholesale customers have agreed to purchase special access service under 26 different price flex offers and SBC is actively negotiating 60 new price flex arrangements.



*Note the 2004 data is year to date through October 2004 and the 2005 numbers are projected.

Contract Terms are Pro-Competitive

- Claims that CLECs must give 95% of high capacity business to SBC are flatly incorrect.
  - Carriers are not required to use SBC for growth, much less virtually all of their special access, to qualify for MVP
  - Carriers under special access contracts and MVP continue to move circuits to self provisioned and/or competing facilities